

**DECISION FOR**

**APPEAL**

#04-13-00-0016	Idaho Sporting Congress
#04-13-00-0018	Idaho Conservation League, et al.
#04-13-00-0019	Erik Ryberg
#04-13-00-0020	Nez Perce Tribe
#04-13-00-0021	Hells Canyon Preservation Council

**OF THE**

**PAYETTE NATIONAL FOREST LAND AND  
RESOURCE MANAGEMENT PLAN REVISION**

  
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GLORIA MANNING  
Reviewing Officer for the Chief

**MAR 09 2005**  
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Date

**PAYETTE NATIONAL FOREST LAND AND  
RESOURCE MANAGEMENT PLAN REVISION**

**APPEAL DECISION  
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# **Appeal Decision for the Payette National Forest Plan**

## **Procedural Background**

### **1. Appellants and Record of Decision**

This is my decision on an appeal of the Record of Decision (ROD) for the Payette National Forest Land and Resource Management Plan (LRMP) Revision and its accompanying Final Environmental Impact Statement (FEIS) (the Southwest (SW) Idaho Ecogroup FEIS). The appeal reference number is 04-13-00-00xx, abbreviated hereinafter by the last four digits. The appellants are listed below.

Appellants: #0016 Idaho Sporting Congress  
#0018 Idaho Conservation League, Idaho Rivers United, The  
Wilderness Society and Pacific Rivers Council  
#0019 Erik Ryberg  
#0020 Nez Perce Tribe  
#0021 Hells Canyon Preservation Council

There were no intervenors.

Regional Forester Jack G. Troyer signed the ROD approving the Payette National Forest LRMP on July 25, 2003. The appellants, under regulations at 36 CFR 217.8, each filed a timely Notice of Appeal (NOA). The Regional Forester transmitted the records for the appeal to the Chief of the Forest Service in conformance with the regulations at 36 CFR 217.15(a).

### **2. Summarized Request for Relief**

Requests for relief were varied, and most would require a full or partial reversal of the LRMP revision decision. Three of the appellants, with or without other specific requests, called for the withdrawal of the Payette LRMP to correct alleged deficiencies related to the National Environmental Policy Act and the National Forest Management Act, and their implementing regulations. Specific requests for relief were tied to particular appeal issues, such as requests to reevaluate management indicator species, improve standards for the management of fish and wildlife (including salmon species and bighorn sheep), reduce domestic sheep grazing (including within the Hells Canyon National Recreation Area), correct watershed analyses and/or provide additional standards for ensuring water quality, improve analyses related to roads and mechanized vehicle uses, and comply with the Roadless Area Conservation Rule.

### **3. Summary of Issues**

My review of appellant's concerns provides a focused response to contentions involving a number of complex regulatory and management issues. Although every contention made in the appeals may not be cited in the same order or format in this decision, all of the appellants' concerns have been considered. My review of the appeals focused primarily on compliance of the FEIS, Revised LRMP and ROD with applicable law, regulation and policy as cited by appellants.

Appellants raised many appeal issues covering a range of national forest resources and uses, including wildlife and wildlife habitat, aquatic resources, livestock grazing, roadless areas, motorized uses, and water quality. Appellants also raised procedural concerns related to laws and regulations, most commonly the National Environmental Policy Act and its implementing regulations, the National Forest Management Act and its implementing regulations, the Endangered Species Act, and the Clean Water Act.

### **4. Decision**

With regard to all of the issues, other than the management of bighorn sheep and its habitat, the Regional Forester met the requirements of applicable Federal law, regulation and policy. I affirm the Regional Forester's decision to select Alternative 7 from the SW Idaho Ecogroup FEIS as the Payette NF LRMP except as discussed in the next paragraph.

I am reversing the Regional Forester's decision to approve revised management direction for the Hells Canyon Management Area (MA) as it pertains to bighorn sheep and its habitat. The Regional Forester is instructed to reanalyze bighorn sheep viability within the Payette NF, amending the SW Idaho Ecogroup FEIS accordingly, and to evaluate, and adopt as necessary, changes in the management direction for the Hells Canyon MA and adjacent areas. The discussion of bighorn sheep viability and management direction under "Viable Populations" (pages 10-15 of this appeal decision) includes more detail on these instructions.

This decision is the final administrative determination of the Department of Agriculture unless the Secretary, on his own initiative, elects to review the decision pursuant to the requirements of 36 CFR 217.17(d). By copy of this appeal decision, I am notifying all parties to this appeal.

### **Payette National Forest Land and Resource Management Plan**

The Payette National Forest (NF) is located in west central Idaho. It occupies approximately 2,300,000 acres of National Forest System land. Elevations range from 1,600 feet to over 9,500 feet, and the wide variety of the Forest's landforms, elevations and climate have produced in turn a wide variety of vegetative conditions. The Payette NF provides habitat for over 300 terrestrial and aquatic wildlife and fish species. Both urban and rural residents use the Payette NF for cultural, recreational and commercial uses.

The Payette National Forest LRMP was prepared under the Multiple-Use Sustained-Yield Act (MUSYA), the Forest and Rangeland Renewable Resources Planning Act (RPA) of 1974 as amended by the National Forest Management Act (NFMA), the September 30, 1982, implementing regulations of the NFMA (36 CFR 219, as amended September 7, 1983), and the National Environmental Policy Act (NEPA) and its implementing regulations (40 CFR 1500-1508). The 1982 NFMA implementing regulations were replaced by the November 7, 2000 planning rule (36 CFR 217 and 219), which however included a transition period for forest LRMP revisions or amendments already in progress that allowed the Responsible Official to elect to remain under the 1982 regulations. On May 20, 2002, the Forest Service extended the transition period until adoption of a new rule (FR 35451). Due to the transition provision, the revision of the Payette LRMP was done according to the requirements of the 1982 NFMA implementing regulations.

The National Forest LRMP at issue in this appeal is a programmatic framework for management of the Payette NF, an administrative unit of the National Forest System. An LRMP establishes direction for all future decisions within the planning area, consistent with the NFMA requirement to use an “interdisciplinary approach to achieve integrated consideration of physical, biological, economic and other sciences” (16 USC 1604(b), (f), (g) and (i)). A National Forest LRMP also provides for the coordination of multiple uses (such as outdoor recreation, range, watershed, wildlife and fish) and the sustained yield of products and services (16 USC 1604(e)). The original Payette National Forest LRMP was issued in 1990.

The Payette National Forest LRMP includes forest-wide desired future conditions, goals, objectives, and standards and guidelines for the resources and uses of the plan area. The forest-wide standards and guidelines are used as applicable whenever a site-specific project is implemented (Payette LRMP, Chapter 3). The LRMP assigns specific portions of the Forest to management prescription categories, which are allocated by geographic units called management areas, each providing additional standards and guidelines specifying the kinds of uses and activities that may or may not take place in those portions of the Forest (Payette LRMP, Chapter 3). The Payette National Forest LRMP also contains implementation direction and a monitoring and evaluation strategy (Payette LRMP, Chapter 4).

The standards contained in the Payette LRMP operate as parameters within which projects must take place. Approval of any project must be consistent with these management standards (16 U.S.C. 1604(i)). If a project cannot be conducted within these parameters, the project cannot go forward, unless the plan is amended to allow for project execution (*see Swan View Coalition v. Turner*, 824 F. Supp. 923, 933 (D. Mont. 1992)). Forest LRMPs are permissive in that they allow, but do not mandate, certain activities. Approval of the Payette National Forest LRMP does not mandate any project decisions. Projects occur only after they are proposed, their effects on the environment considered, and a decision is made to carry out the project.

In summary, the Payette LRMP establishes a framework for decision-making on the Payette NF, using programmatic direction as a gateway for compliance with environmental laws at the project level.

## **Response to Issues**

Note: In addition to the laws and regulations discussed herein, some appellants alleged violations of the Administrative Procedures Act (APA). The APA, which for the Forest Service has no implementing regulations, provides that a reviewing court may “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .” (5 USC 706 (2)(A)). It is thus a statute more directly applicable at the level of judicial review. For administrative level reviews of agency decisions under administrative appeal, findings that agency decisions are (or are not) consistent with other laws relevant to appeal issues constitute a finding that the decision is not (or is) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and thus is (or is not) consistent with the APA.

## **National Forest Management Act (NFMA)**

### **1. Management Indicator Species (MIS)**

#### *Selection of MIS*

##### Contentions:

One appellant contends: “the Forest Service violated the NFMA and its implementing regulations by failing to select adequate and appropriate management indicator species in the development of the [Revised Forest Plans]” (NOA #0018, p. 9). Appellant contends that few MIS were selected to represent forest habitats and that only a single MIS, the sage grouse on the Payette NF, is representative of non-forest habitat types (NOA #0018, pp. 12, 13).

##### Discussion:

The regulatory requirements for the designation of MIS state: “In order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as management indicator species and the reasons for their selection will be stated. These species shall be selected because their population changes are believed to indicate the effects of management activities” (36 CFR 219.19(a)(1)). The NFMA regulations do not require that MIS be selected to represent every management activity proposed within a planning unit. Forests are required to use a deliberative process for the selection of MIS and to state the reasons for their selection.

The process used to designate MIS is described in Appendix F of the SW Idaho Ecogroup FEIS, which is the primary source for analysis and evaluation of proposed and final MIS for the Payette NF LRMP (FEIS Appendix F, pp. F-1 through F-38). The FEIS and Appendix F also provide information on why certain terrestrial and aquatic species were

selected as MIS (FEIS, pp. 3-129, and 3-277 to 3-282; Appendix F, pp. F-1 to F-34). The Regional Forester found that the MIS analysis for the FEIS met the requirements of 36 CFR 219.19 (Payette NF LRMP ROD, pp. 8, 11, 16 and 29-31). The Regional Forester approved the selection of white-headed woodpecker, pileated woodpecker and bull trout as MIS for the Payette NF (Payette NF LRMP ROD, p. 8).

The process used to select MIS is thoroughly discussed (FEIS Appendix F). Following the NFMA regulations, the underlying principal was to focus on species that “reflect the effects of management activities” (Appendix F, p. F-1). The analysis considered habitats that have changed substantially from the historic range of variability (HRV) due to past management activities, or that may change substantially due to ongoing and future management activities; another factor considered was to what extent forest-management-related habitat changes are a primary influence on species viability or survival (Appendix F, p. F-2). A number of species were evaluated in the FEIS that rely on non-forest habitats, such as the vesper sparrow, mule deer, elk and Columbian sharp-tailed grouse (FEIS, pp. 3-274 to 3-275, 3-282, 3-286, 3-313, 3-315, 3-324 and 3-327). For all species considered during the MIS evaluation process but not selected as MIS, specific rationale is given as to why (FEIS Appendix F, pp. F-3 through F-8).

Appellant also contends that “[t]he selected MIS fail to reflect the connectivity of habitat types on the Forest . . . The [selected] MIS fail to capture the effects of management activities that fragment habitat” (NOA #0018, p. 16). Habitat fragmentation is addressed through other means than the use of MIS. Fragmentation and disruption were identified in the analysis of management situation as a topic area to be addressed in LRMP revisions (Payette NF LRMP, pp. II-16 to II-18). One desired future condition for the Payette NF LRMP is that “[v]egetation forms a diverse network of habitats and connective corridors for wildlife” (Payette NF LRMP, p. III-7). The Payette NF LRMP includes objectives and guidelines to address fragmentation for terrestrial and aquatic MIS (BNF Plan, pp. III-20, III-25, and III-27). Connectivity and related disturbance factors are addressed in the FEIS and FEIS Appendix F (FEIS, pp. 3-257 to 3-261, 3-277 to 3-282, 3-289 to 3-295, and 3-326 to 3-327; Appendix F, pp. F-8 to F-20, and F-25 to F-31).

#### Decision:

The FEIS demonstrates that a reasoned process for evaluating and selecting management indicator species was followed. The selection of MIS meets the requirements of the NFMA regulations (36 CFR 219.19(a)(1)). I find no violation of law or regulation.

#### *Non-selected species*

#### Contention:

One appellant contends that “the Forest Service is being inconsistent when it dismisses mountain goats as an MIS because management actions have no effect and then state an objective is to reduce disturbance from winter recreation activities” (NOA #0018, pp. 16-

17). Appellant also contends: “[t]he proposed MIS fail to represent the full diversity of aquatic habitat types on the Forests” and that “[t]he MIS discussion (Appendix F) does not even consider and reject amphibians as indicator species, it simply does not consider them at all” (NOA # 0018, pp. 13 and 15-16). Another appellant contends that the FEIS fails to provide a “reasoned discussion” as to why elk are dropped as an MIS (NOA #0016, pp. 3-4).

Discussion:

The FEIS explains why mountain goats were not carried forward as MIS, stating that mountain goats “are a species whose population levels do not indicate the effects of Forest management activities very well” and that “factors that are known to influence goat populations are hunting and predation” (FEIS Appendix F, p. F-5). Many factors affecting mountain goats “are outside the control of the Forest Service, and thus changes in goat populations may not be in response to management activities over which the Forest Service has administrative control.” The FEIS conclude: “mountain goats do not meet the intent of CFR 219.19 to use MIS populations to reflect the effects of Forest management activities.”

The FEIS also discusses the reasons for not keeping Rocky Mountain elk as an MIS (FEIS Appendix F, pp. F-3 to F-4):

Hunting season regulations, predation, chronic wasting disease, and off-Forest winter range decisions are outside the administrative control of the Forest Service. Even supplemental feeding on the National Forest is controlled by the state agency and not a Forest Service management decision. The Forest Service can exert control over access management and vegetation management on Forest administered lands. However, these two factors alone are not influential enough to correlate to elk population fluctuations. Therefore elk do not meet the intent of CFR 219.19 to use MIS populations to reflect the effects of management activities.

The FEIS discloses which aquatic MIS were considered and assessed (Appendix F, pp. F-22 to F-34). Amphibians were not considered for designation as an MIS. The one amphibian species identified by appellant is the spotted frog (NOA # 0018, pp. 13 and 15-16). This is a Region 4 sensitive species, and is thoroughly discussed in the Biological Evaluation (AR doc. # 2098, pp. 16-17, 41 and 49). All sensitive species are covered by specific LRMP management requirements. The designation of sensitive species is one means, in addition to the selection of MIS, of meeting the viability requirements of the NFMA regulations.

Decision:

The rationale for not selecting certain species as MIS is clearly documented, and meets the requirements of the NFMA regulations (36 CFR 219.19(a)(1)). I find no violation of law or regulation.

## 2. Viable Populations

### *Analysis of viability*

#### Contentions:

One appellant contends that old growth has not been discussed in the FEIS, and that there is no forest-wide landscape-scale analysis of old growth; thus, the Forest Service cannot demonstrate that the viability of old growth-dependent species will be maintained (NOA #0016, pp. 2 and 7). Another appellant contends that without a “defensible” analysis of cumulative watershed effects, there is no basis for making a defensible NFMA viability call [for fish species] (NOA #0018, pp. 63-68).

#### Discussion:

The NFMA regulations provide that “[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area” (36 CFR 219.19). The regulation also state: “All management prescriptions shall . . . (6) Provide for adequate fish and wildlife habitat to maintain viable populations of existing native vertebrate species and provide that habitat for species chosen under Sec. 219.19 is maintained and improved to the degree consistent with multiple-use objectives established in the plan” (36 CFR 219.27(a)).

In the Payette NF LRMP ROD, the Regional Forester states: “The Revised Plan addresses species viability in several ways. Forest-wide management direction and prescriptions included standards and guidelines specifically designed to protect, improve, and/or mitigate impacts to watersheds, riparian and aquatic habitats, and threatened, endangered, and sensitive species habitats” (Payette NF LRMP ROD, p. 32). Also: “The Revised Plan addresses vegetation diversity and species viability requirements through expanded and specific desired conditions and direction for vegetation components. Old growth direction in the 1989 Plan has been replaced by large tree size class direction, which research indicates is more appropriate for addressing species viability in our local area” (Payette NF LRMP ROD, p. 32).

There is no specific required procedure for conducting a viability assessment and analysis of potential effects, but whatever process is used must provide for making viability determinations consistent with the NFMA regulations. The introduction to the viability analysis in the FEIS indicates that approaches described by Andelman et al. (2001) and Holthausen et al. (1999) were used in developing procedures for assessing viability (FEIS, p. 3-295). Methodologies for viability analysis are further discussed in the Biological Evaluation (AR Doc. #2098) and the Biological Assessment (AR Doc. #2356).

Appellant’s contentions regarding old growth are unspecific. The SW Idaho Ecogroup FEIS contains a detailed discussion of the reasons for using “large tree size” rather than “old growth” as a major forested vegetation component to track and analyze, and for

which to provide specific direction (FEIS, pp. 3-432 to 3-435). This approach was also used in the Interior Columbia Basin analysis, and is based on applicable scientific literature. The FEIS effects analysis includes detailed, though separate, discussions of the forest vegetation components generally considered to make up old-growth forests (tree size class, canopy closure, species composition including seral stages, and snags and coarse woody debris) (FEIS, pp. 3-444 to 3-478, and 3-519 to 3-548). Appellant does not provide any discussion or reasons of why this approach will not adequately address, at the programmatic level, the needs of wildlife species associated with forests having old-growth characteristics.

Appellant's contentions regarding cumulative watershed effects and viability rely primarily on characterizations of the NOAA Fisheries Biological Opinion (AR Doc. #2367). In particular, appellant cites NOAA Fisheries addition of "a 15 % ECA limitation" in the Upper Salmon River basin as evidence that LRMP watershed standards are not adequate (NOA #0018, p. 64). This is one of the "terms and conditions" required by NOAA Fisheries for meeting the incidental take requirements of the ESA (Sec. 7(b)(4) and Sec. 7(o)(2)). As NOAA Fisheries explains, these terms and conditions are those that can be implemented at the plan level and "are necessary to minimize take associated with subsequent projects or activities" (AR Doc. #2367, p. 88). There is no indication that the addition of terms and conditions in any way invalidates the FEIS effects analysis of fish viability. Overall, NOAA Fisheries concludes that "the Revised LRMPs are not likely to jeopardize the continued existence of [listed fish species], and not likely to destroy or adversely modify designated critical habitat. This conclusion is based in large part on the LRMPs' complete and effective [Aquatic Conservation Strategy], and on examination of projected locations, types, and levels of activities" (AR Doc. #2367, p. 85).

Decision:

I find the Regional Forester's deliberations and proposed management actions have adequately considered and addressed the NFMA viability issues raised by appellants (except those regarding bighorn sheep, which are discussed below). I find no violation of NFMA or the 1982 NFMA regulations.

*Bighorn sheep: viability and management direction*

Contentions:

Appellants contend the Regional Forester has violated NFMA and the Hells Canyon National Recreation Area (NRA) Act on the Payette National Forest by allowing grazing of domestic sheep within or near the range of bighorn sheep, thus threatening the viability of bighorn sheep through disease transmission (NOA #0018, pp. 33-39; NOA #0020, pp. 5-6; NOA #0021, pp. 2-3, 6-8, 10-11 and 14). One appellant stated: "The Hells Canyon National Recreation Area Act . . . requires livestock grazing to be compatible with native wildlife protection . . . the selected alternative fails to address the issues of ongoing conflicts of domestic sheep grazing and wild bighorn sheep in a way that assures the

ultimate survival of the bighorn population and in a manner sufficient to meet its obligations under the HCNRA Act” (NOA #0020, p. 5).

Discussion:

The applicable (1982) NFMA planning regulations provide direction for managing fish and wildlife habitat to maintain viable populations of existing native vertebrate species within the planning area (36 CFR 219.19 and 219.27(a)). “In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area” (36 CFR 219.19). “Planning area” is defined as the area of NFS land covered by a forest plan (36 CFR 219.3). USDA Departmental Regulation 9500-4 (policy on viability) contains a similar requirement.

The Hells Canyon National Recreation Area Act (PL 94-199) provides direction for the “administration, protection, and development” of the Hells Canyon NRA (16 U.S.C. § 460gg-4). The NRA must be administered “in a manner compatible with” seven objectives, two of which are: “protection and maintenance of fish and wildlife habitat,” and the continuation of existing uses, including grazing, “as are compatible with the provisions of this [Act]” (§ 460gg-4). Grazing is recognized as one of several “traditional and valid uses of the recreation area” (§ 460gg-10). Management of federal lands within Hells Canyon NRA is also covered by implementing regulations (36 CFR 292, Subpart F - Hells Canyon National Recreation Area-Federal Lands). Direction for “grazing activities” provides that: “Where domestic livestock grazing is incompatible with the protection, restoration, or maintenance of fish and wildlife or their habitats . . . the livestock use shall be modified as necessary to eliminate or avoid the incompatibility. In the event an incompatibility persists after the modification or modification is not feasible, the livestock use shall be terminated” (36 CFR 292.48(b)).

In the SW Idaho Ecogroup FEIS, the “disease risk to terrestrial wildlife species” is recognized as part of terrestrial wildlife habitat and species issue 2 (FEIS, p. 1-15). As stated there: “One threat is the risk of disease transmission from domestic sheep to bighorn sheep, where their grazing overlaps and the potential for direct contact exists” (FEIS, p. 1-15). For bighorn sheep, this issue is carried forward into alternative development through rangeland suitability reductions in some alternatives. For the Payette NF, suitability reductions, to be effected when grazing allotments become vacant, are proposed for Alternatives 3, 4 and 6 for 15,329 acres (FEIS, p. 2-97).

The FEIS identifies a number of “species with a viability concern,” including “species identified that may be at risk at a more local level” (FEIS, p. 3-295). These latter are elsewhere called “species of special interest,” and include bighorn sheep (FEIS, p. 3-286).

The current distribution of bighorn sheep throughout the planning area, the change in population size and distribution from historic occurrences, and current threats facing this species are described in the FEIS (pp. 3-286 to 3-287, 3-316 and 3-328). Populations

within the Payette and Sawtooth NFs are estimated at “several hundred animals,” and in the Payette occur in two geographic locations, Hells Canyon and Snake River (p. 3-286). The Hells Canyon population (and one in the Sawtooth NF) has “a significant threat of disease transmission from domestic sheep” (p. 3-286). The FEIS further states: “In situations where domestic sheep and bighorn sheep come in direct contact, bighorn sheep almost always die from infections, whereas domestic sheep are unaffected” (p. 3-286).

The Payette NF LRMP includes a Rangeland Resource “Guideline” for Hells Canyon MA #1 that reads:

Within bighorn habitat emphasis areas, close sheep allotments as they become vacant, or convert them to cattle where appropriate, to eliminate the risk of disease transmission from domestic to wild sheep. Do not convert cattle allotments to sheep allotments within occupied bighorn sheep habitat. (SW Idaho Ecogroup LRMP Revisions, Payette NF, Errata #3.)

This is the same area (15,329 acres) noted above for Alternatives 3, 4, and 6 of the FEIS proposed for removal from designation as suitable sheep rangelands upon the closure of vacant allotments (FEIS, p. 2-97). Errata #3 (August 2004) does not make any changes to the FEIS, and does not include this future removal from domestic sheep suitability for the Payette Revised LRMP (FEIS Alternative 7). MA #1 also includes an objective for bighorn sheep: “Coordinate with Idaho Department of Fish and Game, Oregon Department of Fish and Wildlife, and domestic sheep permittees to reduce the risk of disease transmission between domestic and wild sheep” (Payette LRMP, p. III-99).

#### a. NFMA viability

As noted above, bighorn sheep are identified and discussed in the FEIS as a species whose viability is of concern, and background information is presented linking concerns for herd viability with the likelihood of disease transmission from domestic sheep (see also next paragraph). Yet the effects analyses pertaining to bighorn sheep (FEIS, pp. 3-316 and 3-328) do not address or even mention viability. The one-paragraph discussion of direct and indirect effects is limited to: 1) noting alternatives that reduce suitability for domestic sheep grazing for the Sawtooth NF, and 2) noting the multi-state agency agreement for dealing with diseased bighorn sheep that cross into Oregon in the Hells Canyon area (FEIS, p. 3-316). The discussion of cumulative effects is similarly limited (FEIS, p. 3-328). While both discussions identify the Hells Canyon area (in one case along with the Salmon River Canyon area) as having “the best potential for expansion due to the large amounts of continuous habitat and the relatively low amounts of domestic sheep,” it is also pointed out that expansion will only occur “in those habitats where domestic sheep are absent or confined because of potential disease concern” (FEIS, p. 3-328). There is no discussion of the extent to which domestic sheep may be “absent or confined,” and no additional effects analysis except the statement that “domestic sheep grazing in Idaho near the Hells Canyon NRA is still a disease transmission issue due to the mobility of bighorn sheep and potential for disease spread” (FEIS, p. 3-328).

Two bighorn sheep populations, or herds, are identified for the Payette NF in the FEIS, Hells Canyon and Snake River (corresponding to LRMP MAs 1 and 2, which share a common boundary), but the Hells Canyon population only is identified as having a threat of disease transmission from domestic sheep (FEIS, p. 3-286). However, FEIS Appendix F, Figure F-5, shows the area of disease risk within the Payette NF as overlapping equally MAs 1 and 2 (Appendix F, p. F-34), and information on radio-collared bighorn sheep from the Oregon Department of Fish and Game shows that bighorn sheep move freely between the two management areas (FEIS Appendix A, letter #53). This indicates that the entire bighorn sheep population within the Payette NF is both contiguous in habitat and subject to the threat of disease transmission.

The statement from the FEIS that “where domestic sheep and bighorn sheep come in direct contact, bighorn sheep almost always die” (p. 3-286) is supported by considerable scientific research (e.g., Onderka and Wishart 1984, Onderka and Wishart 1988, Callan et al. 1991, Martin et al. 1996, Quigley and Arbelbide 1997c, Wisdom et al. 2000), some of which is cited in the FEIS or included in the appeal record (AR Doc. #2462). Bighorn sheep experts recommend that to minimize disease outbreaks in bighorn sheep, spatial or temporal separation must be maintained between bighorn and domestic sheep on native ranges at all times (Schommer and Woolever 2001 (AR Doc. #2462)).

According to the SW Idaho Ecogroup FEIS, the purpose of not reducing suitable domestic sheep acres in the Hells Canyon MA under the Payette NF LRMP (Alternative 7) “was to recognize the 1997 agreement reached by members of the Hells Canyon Bighorn Sheep Restoration Committee with the Idaho Woolgrowers Association and to identify an alternative that recognizes the Payette National Forest System lands were not considered as part of the original restoration plan” (FEIS, p. 3-678). This “agreement” is from “Restoration of Bighorn Sheep to Hells Canyon: the Hells Canyon Initiative” (Hells Canyon Initiative), 1997, Bureau of Land Management Technical Bulletin 97-14 (AR Doc. #2462). As that publication states: “The Memorandum of Agreement covers the portion of the project area within the Pacific Northwest Region (Region 6) of the U.S. Forest Service” (Hells Canyon Initiative, p. 1). Several “contiguous allotments in bighorn sheep habitat” within the Payette NF “are not covered,” yet are “currently active and are expected to remain so in the near future” (Hells Canyon Initiative, p. 6).

The purpose of discussing this agreement in the FEIS is not clear. Since the agreement does not cover the Payette NF portion of Hells Canyon, its apparent use in the design of the Payette LRMP (Alternative 7) is problematical. How can the proposed management of lands not covered by the agreement be considered to “recognize” that agreement? The Hells Canyon Initiative is not accompanied by an environmental analysis under NEPA and had no public involvement, yet it is relied upon for conclusions pertaining to bighorn sheep effects in the FEIS (p. 3-287; see also p. 3-316).

Payette NF LRMP direction pertaining to bighorn sheep in the Hells Canyon MA was described above. It is limited to a coordination objective, and a guideline for closing domestic sheep allotments should they become vacant. “Guideline” is defined as “a

preferred or advisable course of action generally expected to be carried out” (Payette LRMP, p. GL-17). The Payette LRMP does not contain any direction for protecting or maintaining bighorn sheep or their habitat in the Hells Canyon MA, in particular for the protection of bighorn sheep from the documented current and likely future threat of disease transmission from domestic sheep. By permitting the presence of domestic sheep within occupied bighorn sheep range, the Payette NF does not appear to be managing the habitat to maintain viable populations of bighorn sheep.

Based on the above analysis, the viability of bighorn sheep populations within the Hells Canyon area, and across the Payette NF, appears to be threatened by allowing continued grazing of domestic sheep in or near occupied bighorn sheep habitat. As documented in the FEIS and relevant scientific literature, without immediate removal of domestic sheep from occupied bighorn sheep habitat, bighorn sheep within that habitat are likely at risk of extirpation. Bighorn sheep habitat is contiguous between the Payette NF and NFS lands to the north, east and south, and bighorn sheep appear to move between the two identified habitat areas (Hells Canyon and Snake River) within the Payette NF (FEIS Appendix A, letter #53; NOA #0021, Attachment A). Transmission of disease to bighorn sheep on the Payette NF that are part of the Hells Canyon population will place the entire Payette NF population at substantial risk.

#### b. Hells Canyon NRA Act

All three appellants contend that management of bighorn sheep within the Payette NF also violates the Hells Canyon NRA Act (and in one case its implementing direction), one stating: “Domestic sheep on the Payette [NF] also jeopardize the survival of bighorn sheep on the adjacent Hells Canyon [NRA]” (NOA #0018, p. 36). (Additionally, two appellants appear to believe that the Hells Canyon MA on the Payette is part of the Hells Canyon NRA. While this portion of the Payette NF was part of a larger Hells Canyon/Seven Devils Scenic Area, it was not included in the Hells Canyon NRA and Wilderness when that was created by Congress in 1975 (Payette NF LRMP, p. III-91)). The Act requires, as appellants contend, that livestock grazing within the Hells Canyon NRA must be compatible with wildlife habitat maintenance and protection. In addition, implementing regulations governing management of the Hells Canyon NRA require the modification or termination of domestic livestock grazing that is incompatible with the protection, restoration, or maintenance of wildlife or their habitats (36 CFR 292.48(b)).

While the Hells Canyon MA is thus not specifically included within the Hells Canyon NRA Act, it is clear that by permitting the presence of domestic sheep within adjacent occupied bighorn sheep range, and with the documented movement of bighorn sheep between the NRA and the Payette NF (see discussion above, and the specific citations in NOA #0018, p. 37), the Payette NF is not managing livestock grazing in the Hells Canyon MA in a manner compatible with the protection and maintenance of bighorn sheep or their habitat within the Hells Canyon NRA.

Any intended relationship between the Hells Canyon Initiative and management direction for the Hells Canyon MA is not clear. As noted above, the Hells Canyon management

area (MA #1) in the Payette NF LRMP includes an objective for bighorn sheep: “Coordinate with Idaho Department of Fish and Game, Oregon Department of Fish and Wildlife, and domestic sheep permittees to reduce the risk of disease transmission between domestic and wild sheep” (Payette LRMP, p. III-99). However, as noted in FEIS Appendix A (in reference to the Hells Canyon agreement): “The three state departments of Fish and Wildlife agreed to take whatever action was necessary to reduce further losses without adversely impacting the existing domestic sheep operators outside of the project area” (Appendix A, p. A-257). The project area did not include the Payette NF, thus lands “outside of the project area” include the Hells Canyon MA on the Payette NF. Such a position may not be commensurate with law and regulation for the Hells Canyon NRA, and suggests that the coordination objective will not be effective.

Decision:

Serious questions are raised in the SW Idaho Ecogroup FEIS, supported by applicable scientific literature, about the viability of bighorn sheep populations in the Hells Canyon MA (MA #1) of the Payette NF, and indeed across the Payette NF. However, these questions are left unresolved in the FEIS, and the effects analysis does not address bighorn sheep viability. Management direction in the Payette NF LRMP for the Hells Canyon MA does not adequately provide for habitat to insure the maintenance of a viable bighorn sheep population within the Payette NF (36 CFR 219.19). It also does not adequately protect bighorn sheep populations and habitat in the Hells Canyon NRA (36 CFR 292.48). I find the Payette NF LRMP is not in compliance with NFMA regulations concerning wildlife viability of bighorn sheep, and may not be in compliance with the Hells Canyon NRA Act and its implementing regulations. The Regional Forester’s decision to approve revised management direction in the Payette NF LRMP for the Hells Canyon MA is reversed.

The Regional Forester is instructed to do an analysis of bighorn sheep viability in the Payette NF commensurate with the concerns and questions discussed above, and amend the SW Idaho Ecogroup FEIS accordingly. Changes to the management direction of the Payette NF LRMP for MA #1 (Hells Canyon) and adjacent areas shall be evaluated, and adopted as necessary to ensure bighorn sheep viability. The analysis and evaluation must be extensive enough to support determinations of compliance with applicable law and regulation, specifically the Hells Canyon NRA Act, 36 CFR 219.19, and 36 CFR 292.48.

### **3. Management Direction**

*Lack of binding standards*

Contentions:

Appellants contend that the Payette NF LRMP contains a set of generic and non-binding standards for water quality, soils, wildlife, T&E and sensitive species, soils and old growth that do not insure against damage to soils, slope, water, and watershed conditions or degradation to priority watersheds in violation of NFMA and the NFMA regulations

and the CWA (NOA #0016, pp. 1, 2 and 6; NOA #0018, pp. 44, 47, 53-54 and 67-68; NOA #0019, pp. 2 and 3; NOA #0020, pp. 11 and 14). Appellants contend [to quote one] that the Payette NF LRMP does not include “any quantifiable, measurable” standards, and that without such standards “there is no guide for forest management and activities” (NOA #0016, p. 2; also NOA #0019, pp. 2-3).

#### Discussion:

NFMA (the Act), in Section 6, refers to “standards and guidelines” (§ 6(c)), but the only subsequent use of the term “standard” is a specialized one referring to a technical requirement for timber stands (§ 6(m)). One basic principle of the NFMA regulations is the “[e]stablishment of quantitative and qualitative standards and guidelines for land and resource planning and management” (36 CFR 219.1(12)). The term “standard” (or “guideline”) is not defined by the regulations. It occurs in the definition of “management direction”: “A statement of multiple-use and other goals and objectives, the associated management prescriptions, and standards and guidelines for attaining them” (36 CFR 219.3).

In the NFMA regulatory sub-sections pertaining to forest plan “resource integration requirements” (§ 219.13 through § 219.26) and “management requirements” (§ 219.27), the term “standard” occurs infrequently, sometimes in a generic sense (such as the phrase ‘standard and guideline’ as discussed above, or the phrase “silvicultural and environmental standards” in § 219.27(c)(2)), and sometimes as a specific type of standard (such as the timber “utilization standards” of § 219.16, road construction standards of § 219.27(a)(10), or air quality “standards or regulations” of § 219.27(a)(12)). Few of the resource integration and management requirements use the term standard (or a similar term such as guideline, practice, or measure), and while some imply a measurable quantity, most can be achieved by the use of an unquantified activity (or limitation of activity), course of action, or treatment, or by a qualitative requirement.

The Payette NF LRMP defines “standard” as “a binding limitation placed on management actions (Payette NF LRMP, p. GL-36). Standards are typically action restrictions designed to prevent degradation of resource conditions, or that exceed a threshold of unacceptable effects. The forest-wide management direction of the Payette NF LRMP (pp. III-8 to III-77), as well as the management area direction (pp. III-82 to III-358), includes numerous standards (along with goals, objectives and guidelines) for forest resources that are expressed in measurable, quantifiable terms. A few examples of measurable forest-wide standards include: TEST14 and TEST15, lynx habitat (p. III-12); ASST02, air quality (p. III-16); SWST02 and SWST03, soil resource (p. III-21); TRST01, timber resource (p. III-42); RAST01, forage utilization (p. III-45); and SCST01, scenery (p. III-67). Many other standards and guidelines for forest resources, some measurable or quantifiable and some not, are also included, and meet the various requirements of §§ 219.13 through 219.27 (e.g., pp. III-11 to III-15, III-21 to III-24, and III-26 to III-28).

The Payette NF LRMP includes special management prescriptions to emphasize management for passive (MPC 3.1) and active (MPC 3.2) restoration and maintenance of aquatic, terrestrial, and hydrologic resources (Payette NF LRMP, pp. III-85 to III-86). Emphasis is given to protecting Riparian Conservation Areas and high-risk landslide prone areas (Payette NF LRMP, Appendix B).

One appellant cites an old-growth forest standard from the “old” Payette LRMP, and claims that: “In place of that standard, NOTHING is included in the current plans” (NOA #0016, p. 2). However, there is a standard, WIST01, for the “large tree size class,” expressed in quantifiable, measurable terms, which is intended as a replacement of the old-growth standard from the previous LRMP (Payette NF LRMP, p. III-26). This standard is designed to implement objective WIOB07 for the large tree size class potential vegetation group found on the same page.

Appellant also contends that the soils standards “seem designed to avoid the strictures” of an Idaho Sporting Congress lawsuit (NOA #0016, p. 6). This is a reference to *Neighbors of Cuddy Mountain v. Giles* (CV02-244-S), a lawsuit concerning five timber sale EISs for the Payette NF. This lawsuit ended in a court-approved (January 16, 2003) “Settlement Agreement and Stipulation for Dismissal with Prejudice,” which extended the terms of a November 8, 2002, preliminary injunction and under which the Forest Service agreed to prepare new or supplemental EISs. Plaintiffs’ “Motion for Dismissal with Prejudice” (February 5, 2003), which is not a part of the settlement agreement approved by the judge, states: “counsel for U.S. Defendants represented that the SEISs would also address the issue of soils productivity. As this Court is aware, it denied Plaintiffs’ Motion for TRO/PI on the soils issue.”

It is not clear what “strictures” relating to soil standards appellant is referring to: there are no soils standards required by the settlement agreement or by the preliminary injunction. Consideration of soil productivity in the SEISs would not place any strictures on the three SW Idaho Ecogroup forest plan revisions.

Decision:

The revised Payette NF LRMP contains numerous standards (and guidelines) for resource protection, both forest-wide standards and those designed for specific management areas. These meet the requirements for management direction of the NFMA regulations discussed above. While many standards are expressed in quantifiable, measurable terms, this is not an expressed NFMA regulatory requirement, nor a requirement of the laws and other regulations cited by appellants. I find the standards (and related management direction) of the Payette NF LRMP meet the requirements of law and regulation.

## *Watershed standards*

### Contention:

Appellant contends that “Management Prescription Categories do not comport with the requirements of NFMA to insure against adverse impacts related to water conditions, fish, etc.” (NOA #0018, p. 57). Appellant also contends that the LRMP failed to provide standards for “removing roads in critical habitat areas,” and suggests that Forest-wide direction be added that provides “for no net increase and reduction of road density in all high priority watersheds” (NOA #0018, p. 32). Finally, appellant contends that the Watershed Condition Indicators (WCIs) have not been integrated into management standards, and that there are shortcomings in the use of the “Matrix” in key watersheds (NOA #0018, pp. 67-68).

### Discussion:

NFMA regulations require that soil and water protection measures shall “[c]onserve soil and water resources and not allow significant or permanent impairment of the productivity of the land” (36 CFR 219.27(a)(1)). Also, the regulations provide that “[n]o management practices causing detrimental changes in water temperature or chemical composition, blockages of water courses, or deposits of sediment shall be permitted within [riparian areas] which seriously and adversely affect water conditions or fish habitat” (36 CFR 219.27(e)).

The Payette NF LRMP identifies Management Prescription Categories (MPCs). These are broad categories of management prescriptions that indicate the general management emphasis prescribed for a given area, based on Forest Service definitions developed at the national level. MPCs represent management emphasis themes, ranging from Wilderness to concentrated development. National MPCs have been customized during LRMP revision to better address local issues on the three Forests (Payette NF LRMP, p. III-81). MPCs are assigned by sub-watershed where possible. Management that occurs in MPCs is guided by forest-wide and Management Area direction (Payette NF LRMP, p. III-82). Some MPCs more specifically address soil and water resource needs, such as MPC 3.1, Passive Restoration and Maintenance of Aquatic, Terrestrial and Hydrologic Resources; and MPC 3.2, Active Restoration and Maintenance of Aquatic, Terrestrial and Hydrologic Resources (Payette NF LRMP, pp. III-85 and III-86).

While Management Prescription Categories constitute one means of providing management direction for soil and water resources, other means are forest-wide direction (described in previous discussions) and direction specific to each Management Area (Payette NF LRMP, p. III-80). All work together to provide direction consistent with the management requirements of 36 CFR 219.27.

Road construction, reconstruction or decommissioning decisions are made at the project level, based on site-specific review and analysis. Forest-wide management direction (goals, objectives, standards and guidelines) for addressing roads during project level

planning is included in the Payette NF LRMP (pp. III-58 to III-60). Forest-wide Objective FROB06 is to: “Identify roads and facilities that are not needed for land and resource management, and evaluate for disposal or decommissioning.” Standard FRST03 provides for using an interdisciplinary, science-based roads analysis process in making road management decisions. Guideline FRGU05 provides for considering the obliteration or relocation of roads in RCAs that are degrading riparian-dependant resources, and FRGU06 recommends locating new roads outside RCAs (pp. III-60). This direction generally addresses the specific concerns raised by appellant.

The Aquatic Conservation Strategy includes a component called the Matrix. The Matrix is designed for use in a project NEPA process to assist in project design and analysis (Payette NF LRMP, Appendix B). The Matrix, which incorporates the WCIs, aids in the identification of how management actions may potentially affect soil, water, riparian and aquatic resources conditions, in determining potential effects to ESA-listed fish, and in determining how proposed management actions could potentially affect “beneficial uses” under the CWA.

Another appellant contends the Payette NF LRMP fails to demonstrate that standards and guidelines from the interim measures in Infish and Pacfish have been met or exceeded, in violation of several laws (NOA #0016, p. 5). This contention is unclear and unsupported. On the one hand, appellant contends that Infish/Pacfish standards and guidelines must be met by revised LRMP direction; on the other, appellant asserts that the Infish/Pacfish strategies “themselves are insufficient in terms of maintaining and restoring fish habitat” (NOA #0016, p. 5). Appellant then alleges violations of NEPA, NFMA and EPA, but provides nothing specific as to how these laws are violated, either by Infish/Pacfish, or by not meeting Infish/Pacfish. I cannot evaluate these contentions further.

#### Decision:

The Payette NF LRMP includes comprehensive management direction for the protection of soil and water resources, consistent with requirements of the NFMA regulations. I find no violation of law or regulation.

#### *Standards for landslide-prone areas*

#### Contentions:

Appellant contends the Revised LRMP direction does not provide certainty that management of landslide prone areas will “avoid increasing landslide frequency and adverse impacts in violation of the NFMA mandate to insure against detrimental changes in soil, slope [and] watershed conditions” (NOA #0018, p. 51). In reference to Appendix B, appellant contends: “There is no standard or guidance with respect to the assignment of risk categories to particular areas or sites, so we have no assurance as to what part of the landscape will be protected with which practices” (NOA #0018, pp. 51-52).

### Discussion:

The NFMA regulations require LRMPs to evaluate “existing or potential watershed conditions that will influence . . . hazardous events” (36 CFR 219.23). The regulations direct the agency to develop resource protection measures for soil and water resources. (36 CFR 219.27) The “conservation of soil and water resources involves the analysis, protection, enhancement, treatment, and evaluation of soil and water resources and their responses under management and shall be guided by instructions in official technical handbooks” (36 CFR 219.27(f)). Forest Service Handbook 2509 directs National Forests to: “Establish threshold values where soil disturbances become detrimental, that is, result in significant change . . . Soil quality standards are intended for areas where management prescriptions are being applied, such as timber harvest areas and range allotments . . . Soil quality standards should be established in the Forest Plan [or other documents] . . . Soil quality standards involve setting: (a) threshold values of soil properties or conditions and, (b) allowable areal extent of detrimental soil disturbance” (FSH 2509.18).

As required by NFMA regulations, the Payette NF LRMP describes the methodology used to identify landslide prone areas (Payette NF LRMP, Appendix B, pp. B-41 to B-45, and Appendix G, p. G-1). A map of landslide-prone areas identifying two categories of susceptibility to erosion, high and low to moderate, was developed (Appendix G). Analysis units in some Management Prescription Categories (MPCs) were shifted to other MPCs to provide a different level of management (FEIS, Appendix B, p. B-8).

The Payette NF LRMP has management direction providing for additional review and analysis to be conducted at the project level: standard SWST12 requires site-specific analysis or field verification of broad-scale modeled landslide prone areas, to be conducted within representative areas identified as landslide-prone; guideline SWGU03 provides for field verification of landslide-prone areas and the integration of findings into a final stability assessment (BNF Plan, pp. III-22 and III-23).

### Decision:

The Payette NF LRMP provides guidance for project activities that ensures that landslide-prone areas are identified, field-verified and analyzed. I find this direction is consistent with NFMA regulatory requirements for the protection of soil and water resources (36 CFR 219.27).

### *Grazing standards*

### Contentions:

One appellant contends that while some Forest Plan standards (e.g., TEST06, SWST01 and SWST04) generally apply to grazing and all other land uses, the “key” standard for grazing, RASTO1, “unjustifiably depends on enforcing utilization and stubble height standards [because] there is no basis to support a finding that a 45% utilization and 4 inch

stubble height would adequately protect riparian areas from grazing-caused degradation” (NOA #0018, pp. 49-50).

Discussion:

The Payette NF LRMP includes standards for Soil, Water, Riparian, and Aquatic Resources (pp. III-21 to II-24), several of which address protections that would include effects of grazing on riparian areas, including stream bank protection (SWST01, SWST02, SWST03 and SWST07). Standards and guidelines for Rangeland Resources more directly address the protection of riparian areas (RAST01, RAST02, RAST03, RAST04, RAGU01, RAGU02, RAGU03, RAGU04, RAGU05, RAGU08 and RAGU09). Riparian Conservation Areas (RCAs) are identified for the application of many of the Soil, Water, Riparian, and Aquatic standards and guidelines (Payette NF LRMP, Appendix B, pp. B-32 to B-41). Bank stabilization is one criterion used in delineating RCAs (Payette NF LRMP, Appendix B, p. B-37).

One appellant challenges the basis of standard RAST01, which sets limits on forage utilization in riparian areas: “Maximum 45 percent use or retain a minimum 4-inch stubble height of hydric greenline species, whichever occurs first” (Payette NF LRMP, p. III-45). Appellant contends that this is the only “key” grazing standard for riparian areas, and uses one paper (Rhodes 2003) to support its argument for a more restrictive standard (NOA #0018, pp. 49-50).

First of all, appellant ignores the several other standards and guidelines noted above that provide specific protection for riparian areas from grazing. For example, RAST02 limits many livestock uses “to those areas and times that maintain or allow for restoration of beneficial uses and native and desired non-native fish habitat,” and RAGU05 provides for “relocation, closure, or changes in management strategy, alteration, or discontinuance” of grazing practices that potentially contribute to the degradation of water quality or aquatic species (Payette NF LRMP, pp. III-45 to III-46). Guideline RAGU02 actually provides for considering a greater “stubble height” (“residual vegetative cover (at least 6 inches of hydric vegetation)”) in grazing allotments where riparian area restoration is an objective (p. III-46).

Secondly, the paper cited by appellants offers general recommendations for the protection of native salmonids for the entire Interior Columbia River Basin: it does not address conditions specific to the three SW Idaho Ecogroup forests. Although it generally criticizes the use of forage utilization standards, only one of seven specific recommendations applies to grazing (five concern roads, and one water withdrawals), and this is to prohibit grazing within riparian systems with high water temperatures, degraded riparian vegetation, unstable banks or elevated sedimentation “with attributes rendering them susceptible [to] livestock damage” (NOA #0018, p. 91). Appellant does not explain how this recommendation (which they cite) invalidates, or even applies to, the standard in question. As noted, guideline RAGU05 provides for discontinuing grazing uses that potentially affect water quality or aquatic species; other standards and guidelines apply protection for riparian areas in need of restoration.

Decision:

The Payette NF LRMP includes management direction for minimizing the effects of grazing on soil, water and riparian resources. This direction meets the resource protection requirements of the NFMA regulations. I find no violation of law or regulation.

*Wildlife (elk) standards*

Contentions:

Appellants contend that State of Idaho objectives for elk populations are not adequately addressed or discussed (NOA #0019, p. 1; NOA #0020, pp. 27-28). Appellants contend that the effects of road use on elk are not disclosed (NOA #0019, p. 2), and that no standards are provided for protecting “the elk population” from ATV access” (NOA #0016, pp. 3-4).

Discussion:

The NFMA implementing regulations provide direction on management of big game in cooperation with state fish and game agencies, including the requirement that “[b]iologists from State fish and wildlife agencies and other Federal agencies shall be consulted in order to coordinate planning for fish and wildlife”(36 CFR 219.19(a)(3)). The regulations also require that access problems for hunting shall be considered (36 CFR 219.19(a)(4)).

Regulations for the “use of motor vehicles off forest development roads” (36 CFR 295) establish policies and procedures for ensuring that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands. They require the Forest Service to coordinate “with appropriate Federal, State and local agencies” (36 CFR 295.2(a)) and to monitor OHV effects on resources (36 CFR 295.5). Executive Order 11989 (amended by EO 11644) provides for administrative discretion in the protection of public lands, and for restricting off-road vehicle access when adverse effects on resources are documented.

Rocky Mountain elk are identified as a “species of special interest” in the SW Idaho Ecogroup FEIS, primarily due to their “high social and economic value to the public” (FEIS, p. 3-282). The FEIS discusses the current status of elk populations on National Forests in Southwest Idaho (FEIS, pp. 3-282 to 3-286). Factors that may affect elk populations are identified, and the potential effects of the management alternatives on elk populations are disclosed (FEIS, pp. 3-282 to 3-286, 3-315, and 3-327 to 3-328). State of Idaho population objectives for elk are discussed on pages 3-283 to 3-286, including tabular and map displays showing how well objectives are being met for the State’s big game management units (Table W-7 and Figure W-1). Considerations for meeting objectives in the future are also discussed (FEIS, pp. 3-327 to 3-328).

The FEIS acknowledges that Forest Service management actions, including road management, “can influence mortality rates during the hunting season” (FEIS, p. 3-282), and identifies “motorized road and trail densities and cross-country motorized access” as one measure for elk vulnerability analysis (p. 3-285). In discussing the current situation, the FEIS concludes:

Access management in selected locations to restrict motorized travel during the hunting season is occurring on all three Forests currently . . . State Fish and Game agencies monitor elk populations annually. Overall, elk populations statewide are currently near all-time highs, indicating that no major habitat limitation is currently present, which seems to be the situation within the Ecogroup as well (FEIS, p. 3-285).

Access management considerations are included in the discussion of environmental consequences (FEIS, pp. 3-315, and 3-327 to 3-328). As the FEIS notes:

Access management is currently conducted through agreements with state agencies. These agreements are expected to continue, and Forest Plan direction encourages the coordination of access management with the appropriate state and federal agencies, and tribes (p. 3-315).

Also, referring to Table W-8, “Ecogroup Average Road Miles” (p. 3-296), the FEIS notes that all alternatives show an overall reduction in road miles (more roads decommissioned than newly constructed) in the short term (p. 3-315).

The Payette NF LRMP includes management direction for big game species, which include Rocky Mountain elk. Two objectives are to: 1) work with IDFG to address species (population) objectives when management activities may affect those objectives (WIOB11), and 2) implement area and route closures to address big game vulnerability, and coordinate closures with state and federal agencies and tribal governments (WIOB12) (Payette NF LRMP, p. III-26). Guidelines include evaluating big game vulnerability to road-related mortality during travel management planning at all scales (WIGU08) (p. III-28).

Appellants also contend that since a specific evaluation of Elk Habitat Effectiveness (EHE) was not used in the evaluation of management alternatives, the resulting standards are not adequate to maintain elk habitat (NOA #0016, p. 3; NOA #0020, p. 24). The NFMA regulations do not require any particular method for the evaluation or analysis of wildlife species or habitat. As noted above, the SW Idaho Ecogroup FEIS discusses the current status of elk populations within the three Ecogroup forests, and the potential effects of LRMP alternatives. Consideration and management of elk habitat is provided for through management direction in each LRMP. Whether or not EHE was used as an evaluation tool, the effects of this direction have been analyzed and disclosed.

Decision:

The SW Idaho Ecogroup FEIS adequately discusses elk population objectives and hunter access concerns. The Payette NF LRMP includes direction to coordinate with state agencies when management activities may affect elk populations on National Forest System lands. I find no violation of law, order or regulation.

**4. Monitoring**

Contentions:

Appellant contends that the revised Payette NF LRMP lacks a “binding, data-specific monitoring plan,” that monitoring direction is in the form of “up to” statements (as in doing something “up to 25 %”) so that a top limit of what will be done is given but no bottom limit, and that the monitoring program lacks any discussion of necessary budgets (NOA #0016, p. 2). Appellant contends that monitoring for certain resources relies “on WCIs, which are not defined and fail to require any kind of action based on indicator findings” (NOA #0016, p. 2). These alleged failures are seen as violations of NFMA.

Discussion:

The NFMA regulations provide specific monitoring direction, which is found in 36 CFR 219.12(k), *Monitoring and evaluation*. The terms monitoring or monitoring plan are not defined. Monitoring activities (such as what to measure, the frequency of measurement, and precision and reliability) to be included are described in §219.12(k)(4). One additional monitoring requirement pertains to management indicator species: “Population trends of the management indicator species will be monitored and relationships to habitat changes determined” (36 CFR 219.19(a)(6)).

Monitoring and evaluation requirements for the Payette NF are included in Chapter IV of the Payette NF LRMP (“Monitoring and Evaluation Direction,” pp. IV-3 to IV-15; also pp. IV-17 to IV-18). Table IV-1, Forest Plan Evaluation Expectations (pp. IV-5 to IV-6), covers the general requirements of 36 CFR 219.12(k)(1)-(3), and these are further described, and the requirements of 36 CFR 219.12(4) included, in Table IV-2, Monitoring Elements (pp. IV-6 to IV-15). The direction for monitoring and evaluation in Tables IV-1 and IV-2 meets all requirements of 36 CFR 219.12(k). A specific monitoring element in Table IV-2 addresses the monitoring requirement of 36 CFR 219.19(a)(6), with the monitoring question: “Are management actions maintaining or restoring distribution and abundance of management indicator species?” (Payette NF LRMP, p. IV-11).

Appellant’s first specific contention is that monitoring standards “set a top limit of what will be done, but no bottom limit. So, the agency can do nothing if it so chooses, and not be held accountable” (NOA #0016, p. 2). Although appellant gives a generic example of such a standard, there are no specific ‘standards’ cited. It is not obvious what appellant means by a monitoring standard (or why a standard, or monitoring requirement,

expressed without a bottom limit would necessarily lead to doing nothing). The NFMA implementing regulations do not use the term in giving the requirements for monitoring.

Table IV-2 (pp. IV-6 to IV-15) includes all required elements specified in 36 CFR 219.12(k) and 36 CFR 219.19(a)(6). I do not find any monitoring question or indicator (the closest thing to what appellant appears to be referring) in this table that is expressed as an “up to” requirement with no bottom limit. Appellant may be referring to the watershed condition indicators (WCIs) found in Appendix B of the Payette NF LRMP (pp. B-12 to B-21), used for one monitoring activity of Table IV-2 (“Distribution of aquatic ecosystems,” p. IV-12). While many of these indicators are expressed as a “limit,” some have top limits (as in “< 12% fines (< 0.85 mm) in gravel”), some are ranges (“adults in local populations < 500 but > 50”), and some have bottom limits (“> 20 pieces per mile”). None of these are stated in a way that would lead to doing nothing.

Appellant also contends that: “There are no requirements that the monitoring program be implemented and no discussion of budgets necessary or available for these purposes” (NOA #0016, p. 2). Concerning implementation requirements, the inclusion of detailed direction in any chapter (or appendix) of an approved LRMP is by itself a requirement for implementing such direction: nothing more specific is needed. “Monitoring and evaluation requirements” are one of the basic elements of any forest plan (36 CFR 219.11(d)). The Payette NF LRMP Chapter IV includes a discussion of how the monitoring and evaluation strategy will be implemented and monitoring and evaluation information used (Payette NF LRMP, p. IV-4). This is reaffirmed by the Regional Forester in his decision:

The monitoring and evaluation section of the Revised Plan is a key to adaptive management. Monitoring and evaluation indicate whether we are achieving what we intended, or if plan amendments are needed. In this revision, I have kept Forest Plan monitoring trim, specific and feasible to focus on key items, and to recognize our workload commitments in other areas (Payette NF LRMP ROD, p. 25).

Concerning a monitoring budget, the same implementation discussion and Regional Forester quotation just noted also indicate an intent to adequately fund the monitoring and evaluation strategy. In fact, the LRMP could not be implemented as described without such funding. The NFMA regulations have no requirement to provide either a monitoring budget, or costs for monitoring elements.

Appellant’s third specific contention is that “monitoring for fish habitat, water quality, old growth forests, etc. rely on WCIs, which are not defined and fail to require any kind of action based on indicator findings” (NOA #0016, p. 2). There are approximately 12 monitoring elements on pages IV-10 to IV-13 of the monitoring and evaluation strategy that pertain directly or indirectly to fish habitat, water quality or old growth forests (and dozens of others from pages IV-6 to IV-15 that pertain to “etc.”), only one of which is specifically linked to WCIs (Watershed Condition Indicators). WCIs are defined in the Glossary of the LRMP (p. GL-40), and are described in detail in Appendix B. Pages B-5 to B-10 of Appendix B give a detailed explanation of how the indicators will be used to

design actions based on indicator findings. A broader discussion of the use of information from monitoring for LRMP implementation is provided on page IV-4 of the Payette NF LRMP. These discussions are fully consistent with NFMA regulatory requirements for the use of monitoring and evaluation information (36 CFR 219.11(k)).

Another appellant contends that “[t]he Forest Plans propose reviewing only 5% of projects within known occupied habitat to determine whether Forest management actions are affecting species habitats. This monitoring effort is insufficient to accurately monitor populations with any statistical certainty” (NOA #0018, p. 11). This is a reference to the first of two monitoring requirements for management indicator species (MIS) (Payette NF LRMP, p. IV-11). However, the monitoring frequency is stated as “up to 25 percent” so this contention is incorrect. In addition, this item is for monitoring changes to habitat: the second MIS requirement is for monitoring population trends.

Decision:

The revised Payette NF LRMP contains monitoring and evaluation direction and elements that meet all the monitoring and evaluation requirements of the NFMA regulations. There is every indication that the monitoring and evaluation strategy will be implemented and funded, and that monitoring information will trigger actions as required by the regulations. I find the monitoring and evaluation strategy of the Payette NF LRMP meets the requirements of law and regulation.

**5. Best Available Information**

Contentions:

One appellant contends the Forest Service failed to use accurate and up-to-date information, which is evidenced by the failure to use the Infish information regarding appropriate buffer widths (NOA #0019, pp. 1, 2 and 3). Another appellant contends that the background statements related to FEIS Issue 1 “are not consistent with best available science” (NOA #0018, p. 61).

Discussion:

The NFMA regulations require the interdisciplinary team to “collect, assemble, and use data, maps, graphic material, and explanatory aids, of a kind, character, and quality, and to the detail appropriate for the management decisions to be made” (36 CFR 219.12(d)). NEPA regulations require that “[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements” (40 CFR 1502.24).

The FEIS and LRMP discuss the relationship of the Aquatic Conservation Strategy (ACS) to Pacfish and Infish, and highlight the use of new information developed since the 1995 Infish (FEIS, pp. 3-104 to 3-109, and 3-139 to 3-143; Payette NF LRMP, pp. II-24 to II-28, and Appendix B, pp. B-32 and B-47). The Regional Forester also discusses

the need to update and improve upon Pacfish/Infish direction (Payette NF LRMP ROD, p. 10).

Buffer widths (the boundary of the ACS) are an integral part of delineating aquatic conservation areas, and are specified either by using field data and verification (Options 2 and 3), or in-lieu of field data (Option 1) (Payette NF LRMP, Appendix B, p. B-34). The process used for delineating RCAs is described in detail, and includes a thorough discussion on how to determine appropriate buffer widths for various options (Appendix B, pp. B-32 to B-35). The FEIS addresses how the 300-foot buffers are used in the buffering analysis, and how they are linked to the other management prescription categories (FEIS, Appendix B, pp. B-7 and B-8).

FEIS Issue 1 reads: “Forest Plan management strategies may affect the loss of soil-hydrologic function and long-term soil productivity from uncharacteristically lethal wildfire within highly vulnerable subwatersheds” (FEIS, p. 3-92). Appellant contends the background discussions related to Issue 1 “are not consistent with best available science” (NOA #0018, p. 61). Appellant also contends that relevant sources in the literature are not relied upon, “all of which validate that intense, large fires were always a natural element of the disturbance regime on interior west forests, and that these were historically often accompanied or followed by large mudflows and other sediment-depositing events” (NOA #0018, p.62).

The relevant scientific literature used in discussing (and addressing) Issue 1 is extensively referenced and discussed in the FEIS (pp. 3-92, 3-93, and 3-150 to 3-151). Over a dozen papers are cited, most published since 1997. Appellant focuses on only two of these (Riemann and Clayton 1997, and Benda and Dunne 1997), therefore it is uncertain if the remaining sources are also questioned. The discussions clearly demonstrate that the scientific literature is in general agreement on the adverse watershed effects of intense, large fires, including increases in soil erosion and landslides.

Appellant argues that there is no scientific literature supporting the conclusion that past fire suppression practices “have increased fire intensity and spatial extent outside of natural variation” (NOA #0018, p. 62). Whether or not that is the case, the discussion of Issue 1 does not make this point. Issue 1 addresses the potential effects of large, uncharacteristic wildfires, regardless of the conditions causing them, and such effects are well documented (FEIS, pp. 3-92 to 3-93). While one strategy to reduce the risk of such fires is to reduce extreme or high vegetation hazards, there is no stated assumption that these have necessarily resulted from past fire suppression practices.

#### Decision:

The Payette NF has used relevant and recent scientific information in developing the Aquatic Management Strategy, which in part replaces direction from Pacfish and Infish. There is also substantial scientific literature to support the need for reducing the risk of large fires, which can result in undesirable soil erosion and landslides. I find no violation of NFMA, NEPA or their implementing regulations.

## **Clean Water Act**

### Contentions:

Appellant contends the Clean Water Act (CWA) is violated “by allowing degradation of the South Fork [Salmon River] and failing to provide relevant information” (NOA #0016, p. 5; also NOA #0019, p. 1). Another appellant contends that forest plan guidance allows projects to proceed that would cause short-term or temporary degradation, and that this guidance does not protect listed streams from detrimental changes in temperature and sediment through harvest, salvage and thinning operations that adversely affect water conditions or fish habitat (NOA #0018, pp. 53 and 55-56). Appellants claim that SWRA standards SWST04 and SWST07, by focusing on the long-term benefits to watershed resource conditions, are contrary to the requirements in the CWA (NOA #0016, pp. 4-5; NOA #0018, pp. 53 and 55-56).

### Discussion:

States, in implementing the CWA, are responsible for reviewing, establishing, and revising respective state water quality standards (see 40 CFR 131.4). Section 208(b)(2)(F)-(K) of the Act requires the development of a State Water Quality Plan to identify agricultural, silvicultural and other nonpoint sources of pollution and to set forth procedures and methods, including land use requirements, to control to the extent feasible such sources. This plan should include a process to identify and implement nonpoint source controls including Best Management Practices (BMPs). BMPs are the primary mechanism for achieving water quality standards (Sec. 319(a)(1)(C)). BMPs designed and implemented in accordance with a state-approved Water Quality Plan will normally constitute compliance with the Clean Water Act (Sec. 208(b)(2)(F)-(K)).

Regulations governing the elements of a water quality management plan require that such plans “shall describe the regulatory and non-regulatory programs, activities and [BMPs] which the agency has selected as the means to control nonpoint source pollution where necessary to protect or achieve approved water uses” (40 CFR 130.6(c)(4)). These same regulations require the identification of procedures to control agricultural and silvicultural sources of pollution in accordance with section 208(b)(2)(F) of the CWA (40 CFR 130.6(c)(4)(iii)(C)).

The NFMA regulations provide that LRMPs shall comply with the requirements of the CWA “and all substantive and procedural requirements of Federal, State, and local government bodies with the respect to the provisions of public water systems and the disposal of waste water” (36 CFR 219.23(d)). They require evaluation of watershed conditions (36 CFR 219.23(e)), and the adoption of measures for flood loss, floodplains and wetlands (36 CFR 219.23(f)). The regulations also require that: “[n]o management practices causing detrimental changes in water temperature or chemical composition, blockage of water courses, or deposits of sediment shall be permitted within [riparian]

areas which seriously and adversely affect water conditions or fish habitat” (36 CFR 219.27(e)).

The Regional Forester acknowledges the collaborative efforts that took place between the SW Idaho Ecogroup Team and IDEQ to identify environmental quality concerns that would be addressed through the management direction in the Plans (Payette NF ROD, p. 33). The Regional Forester states:

Concerns were addressed through development of the long-term ACS [Aquatic Conservation Strategy] that, in part, addresses maintenance and restoration of beneficial uses associated with water quality . . . Management direction, including best management practices, is designed to maintain or improve soil, water, riparian and aquatic resources, including beneficial uses. Cumulatively this direction will ensure continued compliance with the Clean Water Act (Payette NF ROD, p. 39).

Chapter III, Management Direction, of the Payette NF LRMP includes goals, standards and guidelines for protecting, maintaining and restoring water quality on the Forest (pp. III-19 to III-24). Activities such as silvicultural practices, road construction and maintenance, and livestock grazing activities that potentially impact water quality are covered by this management direction. Forest-wide water quality standard SWST07 provides for ensuring “that new proposed management activities within watersheds containing 303(d) [water quality impaired] listed water bodies improve or maintain overall progress toward beneficial use attainment for pollutants that led to the listing” (Payette NF LRMP, p. III-22). Management Prescriptions 3.1 and 3.2 emphasize management for passive and active restoration and maintenance of aquatic, terrestrial, and hydrologic resources (Payette NF LRMP, p. III-83 to III-85). The Payette NF LRMP places strong emphasis on delineating and protecting Riparian Conservation Areas, and identifying and managing high-risk landslide prone areas (Payette NF LRMP, Appendix B).

One appellant also contends that it is not clear “how WCIs are used to determine whether permissible degradation is proposed or is occurring, nor how the applicable scale of size or time will be decided” (NOA #0018, pp. 48, 55 and 56).

Watershed Condition Indices (WCIs) are a component of the Aquatic Conservation Strategy. WCIs are an integrated suite of aquatic, riparian, and hydrologic condition measures that assist in determining the current condition of a watershed. They are used to help design appropriate management actions, to alter or mitigate proposed and or ongoing actions, and to move watersheds towards desired conditions. They represent a diagnostic means for determining factors of current conditions, and assist in determining future conditions (Payette NF LRMP, p. GL-40).

Appellant also contends that the LRMP violates the CWA because the Forest Service lacks sufficient information to proceed with an activity until a TMDL is developed on listed streams “to fulfill its duties to protect fish, water quality, and aquatic habitat”

(NOA # 0018, p. 55). CWA regulations require that each State identify those water quality-limited segments that still require TMDLs (40 CFR 130.7(b)(1)). 40 CFR 130.7 does not prevent the Forest Service, absent a respective TMDL, from proceeding with activities, especially those activities geared towards watershed improvements.

Decision:

The record demonstrates compliance with the CWA and its implementing regulations through the use of procedures and management direction for the protection and restoration of soil, watershed and aquatic resources. I find no violation of law or regulation.

**Endangered Species Act**

**1. Salmon Species**

Contention:

Appellant contends the Payette NF LRMP does not further, but jeopardizes, the continued existence of Snake River salmonids, and gives little consideration to the commitments of the “All-H Plan” (Basin-wide Salmon Recovery Strategy), therefore violating the Endangered Species Act (ESA) (NOA #0020, pp. 7-8). Appellant also contends that the Aquatic Conservation Strategy’s fishery protection measures are inadequate under the ESA, citing a NOAA Fisheries opinion (NOA #0020, pp. 19-21).

Discussion:

Section 7(a)(1) of the ESA directs that “[a]ll other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species” (16 U.S.C. 1531 (b)).

The Basin-wide Salmon Recovery Strategy, referred to as the All-H plan by the appellant, is a non-binding Memorandum of Understanding (MOU) between the Forest Service and other government agencies (FEIS, p. 44; AR doc. #2356, p. II-10). In their Biological Opinion, NOAA Fisheries stated that “it has been determined that the proposed action is consistent with the specific commitments and primary objectives of the Basin-wide Salmon Recovery Strategy. The action as proposed contains elements addressing each commitment made under the strategy” (AR doc. #2367, p. 46). The MOU provides a conceptual framework for addressing anadromous fish recovery in the Columbia River Basin, and provides context and linkage for other federal and regional efforts.

The Aquatic Conservation Strategy (ACS), developed to address aquatic species and aquatic habitats, incorporates components of Pacfish and Infish, 1995 and 1998 FWS and NOAA Fisheries Biological Opinions, and relevant requirements of the Endangered

Species Act and the Clean Water Act (Payette NF LRMP, Appendix B, pp. 48-57). The ACS provides direction to maintain and restore characteristics of healthy, functioning watersheds, riparian areas, and associated fish habitats. Riparian Conservation Areas are a component of the ACS providing “both a linkage and transitional habitat between hillslope and upland terrestrial habitats and the aquatic habitats within stream channels” (Payette NF LRMP, Appendix B, p. 32). NOAA Fisheries, in its Biological Opinion concluding that “the Revised LRMPs are not likely to jeopardize the continued existence of [listed fish species],” contrary to appellants contention stated: “This conclusion is based in large part on the LRMPs’ complete and effective ACS” (AR Doc. #2367, p. 85).

In the development of the long-term aquatic strategy, the SW Idaho Ecogroup forests conducted over 70 informal and formal consultation meetings with NOAA Fisheries and FWS, as well as additional meetings with the EPA, IDEQ and local Tribes, and with Forest Service research scientists (Payette NF LRMP ROD, p. ROD-10). The Regional Forester notes that the direction in the ACS allows the necessary management flexibility to accomplish long-term watershed restoration while at the same time balancing the short-term needs for recovery of listed aquatic species” (Payette NF LRMP ROD, p. 8).

The components of the ACS are incorporated into the management direction for aquatic resources in the Payette NF LRMP, and summarized in the discussions in the Biological Assessment (AR doc. #2356, pp. 3-36 to 3-168). Management provisions are provided in Forest-wide direction, specific Management Prescription Categories, and in Management Area direction (AR Doc. #2366, p. 88).

Decision:

The Payette NF developed an aquatic strategy to address listed, proposed, and candidate species as part of the LRMP revision. This was a coordinated effort involving the Forest Service, NOAA, FWS, the State of Idaho, local Tribes and research. The Regional Forester met his obligations under section 7(a)(1) of the Endangered Species Act, and I find no violation of law or regulation.

**2. Road system provisions**

Contention:

Appellant contends that statutory and regulatory requirements under the ESA are not met by the road system determination (NOA #0018, p. 40).

Section 7(a)(2) of the Endangered Species Act (2) requires that “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” The implementing regulations of ESA provide direction to agencies on the consultation procedures that must

be followed when dealing with listed or proposed species, and designated or proposed critical habitat (50 CFR 402).

Potential effects to ESA-listed species from the current and estimated future road system are discussed in the SW Idaho Ecogroup FEIS (pp. 3-182 to 3-183, 3-188 to 3-190, 3-199, 3-204, 3-213 to 3-215, and 3-296 to 3-301). SW Idaho Ecogroup biologists developed a Biological Assessment (BA) for the management direction of the Payette NF LRMP (AR Doc. #2356). This also discusses potential road system effects. It was submitted to the FWS and NOAA in March of 2003, consistent with the requirements in 50 CFR 402. FWS responded with their Biological Opinion on May 30, 2003, and NOAA Fisheries with their Biological Opinion on June 9, 2003 (AR Doc. #2366).

Appellant also contends that “[w]here roads are known sources of water quality degradation and impact threatened and endangered terrestrial and aquatic species, there are no standards outlining the need to remove roads in critical habitat areas” (NOA #0018, p. 41). Forest-wide management direction was developed to provide a high degree of protection to soil-hydrologic conditions, riparian functions and ecological processes, and aquatic habitats from management actions associated with timber, vegetation management, and related road and fire management. “In particular, TEPC Standards 1,4, and 6, TEPC Guideline 1 and SWRA Standards 1 and 4 greatly reduce the potential for negative effects” (AR doc. #2356, p. VI-299). LRMP direction was developed to lower the threat of fish species and critical habitat from road construction for in a number of Management Prescription Categories (AR doc. #2356, p. VI-248).

#### Decision:

The SW Idaho Ecogroup FEIS and Payette NF LRMP demonstrate compliance with the requirements in Section 7 (a)(2) of the ESA concerning effects of the road system on ESA-listed species. I find no violation of law or regulation.

### **National Environmental Policy Act (NEPA)**

#### **1. Affected Environment**

##### Contentions:

Appellants contend a NEPA violation in that “the Documents contain no comprehensive description of the current condition of streams on the forests relative to their status under the CWA” (NOA #0016, p. 6) and fail to recognize past problems of meeting soil management practices” (NOA #0019, p. 1). One appellant also contends “[t]he [FEIS] suffers from a failure to conduct accurate current condition analysis”: information on the condition of bighorn sheep and cause of their decline is lacking (NOA #0019, p. 2).

Discussion:

NEPA regulations require that the EIS “succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration” (40 CFR 1502.15).

The SW Idaho Ecogroup FEIS provides an extensive description of the factors affecting soil, water, riparian and aquatic (SWRA) resources, starting with events and activities from the European-American settlement to those, such as grazing, logging and wildfire, occurring more recently (FEIS, pp. 3-104 to 3-136). To address past and present forest management activities affecting soil, and “to address the shortcomings in the current direction,” management requirements were developed to specify that SWRA resources have a high level of protection (FEIS, pp. 3-137 to 3-138).

The FEIS describes the current condition of bighorn sheep throughout the three-Forest area, including changes in population size and distribution from that of historic occurrence, and identifies the current threats facing bighorn sheep (FEIS, pp. 3-286 to 3-287, and 3-328).

Decision:

The record clearly indicates the discussion provided in the FEIS meets the requirements in 40 CFR 1502.15. I find no violation of law or regulation.

**2. Analysis of Watershed Effects**

Contentions:

Appellants contend the FEIS relies on a flawed aquatic and watershed analysis, through use of the “Matrix” and Watershed Condition Indicators (WCIs) in the Aquatic Conservation Strategy (ACS), and that this results in permitting increased timber harvest and road building, allows additional sedimentation into streams that already violate the CWA, and provides no certainty the Forest Service will protect or restore critical fish habitat (NOA #0018, pp. 48 and 66; NOA #0020, pp 16-17 and 21).

Discussion:

The NEPA regulations provide for discussing the analytical basis for comparing the alternatives, and for the disclosure of the direct and indirect effects and their significance (40 CFR 1502.16). Effects are defined at 40 CFR 1508.8. The NEPA regulations require agencies to insure the professional and scientific integrity of the discussions and analyses in the EIS, and to identify the methodologies used and any scientific or other resources consulted (40 CR 1502.24).

The methodology used in the aquatic analyses is discussed in the FEIS (FEIS, pp. 3-91 to 3-103, and 3-155 to 3-168), and the effects of proposed management on aquatic resources

are analyzed and disclosed (FEIS, pp. 3-136 to 3-254. See also AR doc. #s 2356, pp. VI-143 to VI-470, and 2098, pp. 60 to 106).

The Aquatic Conservation Strategy incorporates aquatic information from the Eastside Ecosystem Management Strategy EIS and the Upper Columbia River Basin EIS, and was developed in collaboration with FWS, NOAA Fisheries, the State of Idaho, and the Nez Perce, Shoshone-Bannock, and Shoshone-Paiute tribes (Payette NF LRMP ROD, p. 5; Payette NF LRMP, Appendix B, pp 48-57). The “Matrix” is one component of the ACS, and in part specifies how the WCIs will be applied. The Matrix is designed to assist in project planning and analysis (Payette NF LRMP, Appendix B).

Decision:

The watershed effects analysis meets the requirements of 40 CFR 1502.16 and 1502.24. I find no violation of law or regulation.

**3. Cumulative Effects**

Contention:

Appellants contend the cumulative effects analysis lacks substance, and fails to adequately evaluate existing conditions which anticipate land disturbing activities (NOA #0016, pp. 3, 4 and 5; NOA #0019, p. 2; NOA #0020, pp. 17-18 and 20-21). One appellant contends this failure does not make it possible “to determine the likely effects on key watersheds . . . and resultant effects on fish habitat” (NOA #0016, p. 3). This appellant also contends: “If the [Forest Service] cannot state what the effects will be measured by, then it is impossible to determine what the cumulative effects will be” (NOA #0016, p. 2).

Discussion:

The NEPA implementing regulations define “cumulative impact” as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions (40 CFR 1508.7). The regulation further provides that cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts, “should therefore be discussed in the same impact statement” (40 CFR 1508.25(a)(2)).

The entirety of information in the sections on Soil, Water, Riparian and Aquatic (SWRA) Resources, and Vegetation Diversity, in Chapter 3, Affected Environment and the Environmental Consequences, SW Idaho Ecogroup FEIS, must be considered in assessing the adequacy of the disclosure of effects to aquatic resources. Past and current conditions and events are discussed under Affected Environment (FEIS, pp. 3-118 to 3-136 and 3-424 to 3-512; see also AR doc. #'s 2356, pp. VI-143 to VI-470, and 2098, pp. 60-106). Direct and indirect effects, by issue and alternative, and cumulative effects, are disclosed under Environmental Consequences (FEIS, pp. 3-136 to 3-254, 3-512 to 3-578;

see also the above referenced appeal record documents). The environmental consequences sections of the FEIS form the basis for the scientific and analytical comparisons of the alternatives considered (as required by 40 CFR 1502.16). It should be noted that, by design, alternatives for LRMPs include proposed activities likely to occur over several decades, and much of the analysis and disclosure of direct and indirect effects is also inherently a discussion of cumulative effects.

For each resource category in FEIS Chapter 3, the discussions and analyses of environmental consequences are preceded by an identification of “issues and indicators” (for example, pages 3-92 to 3-100 and 3-421 to 3-424 for the two resource sections named above). The indicators are specific measurable analysis components used to estimate (measure) the effects of the alternatives. For instance, for SWRA resources, indicators for soil-hydrologic function and long-term soil productivity related to wildfire include vulnerable watersheds with an “uncharacteristic forest vegetation hazard” rating of high or extreme, and management prescriptions which either 1) emphasize, or 2) don’t emphasize, vegetative restoration to reduce the risk of uncharacteristic wildfires (FEIS, p. 3-93). The same effects indicators are further discussed under “methodologies and assumptions” (using the same example, pp. 3-156 to 3-158). This framework for estimating effects is consistent throughout Chapter 3 of the FEIS.

One appellant contends there is no analysis of the cumulative effects of grazing on MIS or their habitat (NOA #0016, p. 4). MIS selected for the three SW Idaho Ecogroup forests are white-headed woodpecker (two forests), sage grouse (one forest), pileated woodpecker (all forests) and bull trout (all forests). White-headed woodpecker and pileated woodpecker habitat does not include rangelands. Potential cumulative effects on bull trout habitat are discussed in the FEIS (pp. 3-250 to 3-254); this discussion incorporates the previous species-specific discussions of direct and indirect effects, including those from grazing (pp. 3-215 to 3-217). Potential cumulative effects on sage grouse, including grazing, are also discussed in the FEIS (pp. 3-326 to 3-327).

Decision:

Cumulative effects to soil, water, riparian and water resources, and MIS species, have been addressed consistent with the NEPA regulations. The SW Idaho Ecogroup FEIS used measurable indicators for the effects analysis. I find no violation of law or regulation.

**Road and Access Management**

**1. Roads Analysis**

Contentions:

Appellant contends that Payette LRMP direction is not consistent with the Road Management Policy (NOA #0018, p. 39). Appellant contends the Payette LRMP does

not show consideration of the roads analysis, and that the roads analysis itself is flawed (NOA #0018, pp. 39-40 and 42-43).

Discussion:

The Forest Service “Road Management Policy” is contained in regulation, 36 CFR 212 – Administration of the Forest Transportation System, and Forest Service policy, FSM 7710 – Transportation Atlas, Records, and Analysis. 36 CFR 212.5 includes requirements for identifying “the minimum road system needed for safe and efficient travel and for administration, utilization, and protection of [NFS] lands” through the incorporation of “a science-based roads analysis” (§ 212.5(b)(1)). It also requires identification of “unneeded roads,” which would then be decommissioned or considered for other uses (§ 212.5(b)(2)). FSM 7712 provides more detail on conducting and documenting the transportation analysis, which for an LRMP revision is done at a forest-wide scale (FSM 7712.12a). Results of the forest-scale roads analysis are documented in a report and used in forest planning; however, the analysis itself is not a NEPA analysis, and “does not compel a forest plan amendment or revision” (FSM 7712.12a).

One forest-scale roads analysis was conducted for the three SW Idaho Ecogroup forests. It is documented in “Forest Scale Roads Analysis Report for the Payette, Payette, and Payette National Forests, June 2003 (AR Doc. #2169). The “Introduction” to the report lays out the general requirements for the roads analysis, based on the regulatory and manual direction summarized above (AR Doc. #2169, pp. i-ii), and the results of the analysis are presented in Chapter 5 of the report. The forest-scale roads analysis was limited to maintenance level 3-5 roads, the majority of which represent the arterial and collector roads for the three forests (AR Doc. #2169, p. 5-1). The remaining system, the level 1 and 2 roads, will undergo study on a sub-forest scale at a later date (AR Doc. #2169, p. 5-3).

The report states: “From resource management and statutory and regulatory standpoints, the arterials and collectors represent the minimum road system needed on the Ecogroup Forests” (p. 5-3). Nine specific reasons are listed, most of which identify the existing arterial and collector system as sufficient for current and anticipated future access needs, and related uses, for particular resources. Although appellant contends that “the current road system” was identified as the minimum system needed (NOA #0018, p. 40), actually only the arterials and collectors comprise the minimum system. It is likely that some local roads will also be identified as part of the minimum system needed, but this determination won’t be made until “watershed and project scale analyses” are conducted (AR Doc. #2169, p. 5-3).

Chapter 5 of the report recognizes that current funding is insufficient to provide for necessary maintenance of all level 3-5 roads (AR Doc. #2169, p. 5-1). The report identifies five actions (not all inclusive) that could be taken, locally to nationally, to address this shortfall (AR Doc. #2169, pp. 5-1 to 5-2). Appellant contends that the road system determination “far exceeds logical long-term funding expectations” (NOA #0018, pp. 41-42). I find that the roads analysis contains a realistic identification of the

minimum needed road system, and while acknowledging current funding problems associated with maintaining this system, considers ways to reduce or eliminate budget shortfalls in the future. Also, the report recognizes that roads analysis is not a static, one-time event: “The process developed for roads analysis must also be dynamic and flexible. The framework defined in this report . . . may be further refined during its application . . . based on improved data and information” (AR Doc. #2169, p. 5-5). The report includes guidelines for “subsequent road system modification and management” that cover decommissioning, deferred maintenance and capital improvement, and road management (AR Doc. #2169, pp. 5-14 to 5-17). Many of these guidelines provide ways to address or reduce funding needs.

Three primary elements of roads analysis as required by regulation were previously noted: identifying the minimum road system needed, conducting a science-based roads analysis, and identifying unneeded roads. The first has just been discussed. The second, a science-based analysis, is aptly demonstrated by considering the “Literature Cited” chapter of the roads analysis report. This includes over 90 references to scientific studies and information sources that cover the range of forest resources and roads-related effects. Finally, the process for identifying unneeded roads and decommissioning opportunities is fully set out on pages 5-9 to 5-17 of the roads analysis. This includes the use of a risk and value relationship indicator (described in AR Doc. #2169, pp. 5-9 to 5-14) to help set priorities for identification and decommissioning.

In the Payette LRMP ROD, the Regional Forester discusses the roads analysis process and states: “The information in [the roads analysis report] has informed my decision” (Payette LRMP ROD, p. 28). In addition to the general considerations discussed above, a more specific indication of the use of information from the roads analysis is found in Table 5-1, “Management Allocations and Road Management Relationships,” of the Forest Scale Roads Analysis Report (pp. 5-7 to 5-9). For each LRMP Management Prescription Category (MPC), the table identifies “road management activity intensities” and links these to MPC objectives.

#### Decision:

My review of the Forest Scale Roads Analysis Report for the SW Idaho Ecogroup forests indicates that an in-depth, science-based analysis was conducted, and that the regulatory and FSM requirements for a forest-scale roads analysis have been fully met. I find no violation of regulation or policy.

## **2. All-Terrain Vehicles (ATVs)**

#### Contentions:

Appellants contend the Payette LRMP FEIS fails to analyze impacts from ATV use, in violation of (variously) law, executive order and regulation (NOA #0016, p. 6; and NOA #0018, pp. 17-30). Rather, as one appellant contends, “the [LRMP contains] only a provision to ‘update’ the Forest Travel Plans . . . and allows all trails currently open to

motorized use to remain open (NOA #0018, p. 17). More specifically, appellant contends the increasing uses and effects of ATVs (including user conflicts, trail maintenance backlogs, and the spread of exotic weeds) have not been recognized (NOA # 0018, pp. 18-23), and that LRMP direction for ATVs is not adequate to meet management prescription goals and objectives, including those for proposed wilderness (NOA # 0018, pp. 18-30).

Discussion:

All-terrain vehicles (ATVs) are a subset of the general category of off-road vehicles. Two Executive Orders provide direction for off-road vehicle use on public lands (these are cited in NOA #0018, pp. 18-19). E.O. 11644, Sec. 3 (1972), requires federal agencies to develop and issue regulations for the administration and management of off-road vehicle uses, and gives parameters for such regulations. This E.O. was amended by E.O. 11989 (1977), adding Sec. 9, which also requires agencies to close areas or trails undergoing “considerable adverse effects” from off-road vehicle uses from those uses until the effects can be eliminated and measures are in place to prevent future recurrence. For the Forest Service, the regulations at 36 CFR 295 (last amended in 1978) contain provisions meeting both of these Executive Orders.

36 CFR 295.2, “Planning and designation for use of vehicles off forest development roads,” states that “the continuing land management planning process will be used to allow, restrict, or prohibit use by specific vehicle types off roads” (§ 295.2(a)), and provides the parameters for “off-road vehicle management plans” (§ 295.2(b)). The regulations thus link off-road vehicle planning to land and resource management planning. By identifying land management planning as a “continuing” process, however, and by not specifying a particular LRMP product (such as a revision), 36 CFR 295 provides discretion on how and when to accomplish planning for off-road vehicle uses. 36 CFR 295.2(a), along with § 295.5, also addresses the additional requirements of E.O. 11989 for closures as needed to prevent adverse effects. Such closures can be done immediately upon the identification of considerable adverse effects.

The current situation regarding off-highway vehicle uses and effects, including ATVs, for the Payette NF is discussed in general in the SW Idaho Ecogroup FEIS, pages 3-717 to 3-719, and for various resources on pages 3-144 to 3-146, 3-293 to 3-294, 3-372, 3-330 to 3-413 (intermittently), 3-770, 3-833 to 3-859 (intermittently), 3-753 to 3-762, and 3-722 to 3-724. The Management Area (MA) descriptions in Chapter 3 of the Payette LRMP include area-by-area discussions of ATV uses and potential effects. FEIS Table RE-2 (p. 3-718) shows that currently 1.79 million acres of the Payette NF, 78 percent of the total National Forest acreage, is closed to summer motorized vehicle uses, which are the uses likely to cause adverse resource effects.

In the Payette LRMP ROD, the Regional Forester notes that the selected alternative (Payette LRMP) “maintains existing motorized recreation opportunities until travel management decisions can address local issues and needs concerning use” (Payette LRMP ROD, p. 12). This deferral of decisions about revising travel management,

including the management of off-road vehicle uses, is further discussed in the SW Idaho FEIS (p. 1-30). Except as they relate to the potential spread of non-native plants, off-road vehicle or ATV uses were not identified as an issue for the SW Idaho Ecogroup LRMP revisions.

The above information indicates that the Payette LRMP revision is consistent with direction for the management of off-road vehicles on public lands. Under current management, 78 percent of the Payette NF is closed to potentially land disturbing (summer) motorized vehicle use, and this closure will remain in effect until travel management plans are revised, which will be done on an area-by-area basis more appropriate for analyzing ATV uses, concerns and effects than is possible for a programmatic LRMP revision. Payette LRMP objectives for recreation provide specific direction for this travel management planning (Payette LRMP, Chapter III, Objectives REOB17, REOB20 and REOB21, p. III-63).

At the same time, specific identified problems, such as the potential spread of non-native plants (weeds), are being addressed. Using a portion of the discussion and direction for MA 3, Weiser River, as an example, the current situation concerning non-native plants is discussed in detail (Payette LRMP, p. III-125), and an objective is provided “to help prevent weed establishment and spread” from off-road ATV uses (Payette LRMP, Objective 0358, p. III-134). The spread of weeds, and potential resource impacts from heavy trail use, are two of the specific problems addressed for all the MAs where ATV uses are permitted.

The Payette NF LRMP has 211,000 acres of MPC 1.2, Recommended Wilderness. Within these areas there are no acres open for summer motorized use, and there are 84 miles of designated motorized trails (SW Idaho Ecogroup FEIS, p. 3-851). MPC 1.2 includes a standard, applicable to all MAs with recommended wilderness, which reads: “Existing motorized or mechanical uses are allowed only if they do not lead to long-term adverse changes in wilderness values” (see for example Payette LRMP, p. III-132).

In summary, I find that both documents contain discussions of the current situation and potential effects of ATV use, and the Payette LRMP: 1) provides for a process to update transportation plans on an area-by-area basis (utilizing the “continuing land management planning process”); and 2) provides standards for taking immediate actions to reduce or eliminate identified or potential adverse effects from ATV uses, including the spread of non-native plants and effects on the wilderness values of areas recommended for wilderness designation. The level of ATV effects analysis is commensurate with a programmatic plan for which off-road or ATV uses or effects were not identified as a significant issue, and for which more detailed area-by-area transportation planning will occur

Decision:

I find the Payette LRMP and associated SW Idaho FEIS are consistent with applicable Executive Orders and regulations for the management of off-road vehicle uses on public lands. I find no violation of law, regulation, order or policy.

**Roadless Rule**

Contentions:

Appellants contend the Payette NF LRMP is in violation of the Roadless Area Conservation Rule (Roadless Rule) (NOA # 0018, pp. 5-8; NOA #0020, pp. 3-5). Appellants allege several specific violations which involve assigning, to areas covered by the Roadless Rule, Management Prescriptions that allow activities (e.g., timber harvesting, road construction and mining) that would normally be prohibited by the rule (NOA # 0018, pp. 5-8; NOA #0020, p. 4).

Findings:

The Roadless Area Conservation Rule, November 2000, was published in the Federal Register January 12, 2001, with an effective date of March 13, 2001. With certain specific exceptions (such as for emergency situations, and access to private in-holdings and/or areas with existing mineral development rights) the Roadless Rule prohibits road construction or reconstruction and associated timber harvesting in Inventoried Roadless Areas within the National Forest System. On May 10, 2001, the Idaho Federal District Court issued a preliminary injunction prohibiting implementation of the Roadless Rule. This action was appealed by intervenors to the Ninth Circuit Court. On December 12, 2002, the Ninth Circuit Court reversed and remanded for further action the Idaho District Court's May 10, 2001, preliminary injunction; however, plaintiffs requested reconsideration by a full Ninth Circuit Court panel. Finally, the Ninth Circuit Court declined this request on April 4, 2003, and again reversed the District Court injunction and remanded the case back to the Idaho District Court for a trial on the merits. (The above information is taken from "Roadless Area Conservation Rule Chronology of Events," USDA Fact Sheet No. fs0200.03, June 9, 2003. This is available on the USDA website under "news/releases.")

On July 14, 2003, the Wyoming District Court, in a separate case, again enjoined implementation of the Roadless Rule (*Wyoming v. USDA*, 01-CV-86-B, July 14, 2003). This decision has also been appealed to the relevant Circuit Court (the Tenth), and that Court has taken no action as of this date.

The decision by Regional Forester Jack Troyer approving the revised Payette Forest Plan is dated July 25, 2003. It thus came after the second District Court decision enjoining implementation of the Roadless Rule, and must comply with that injunction. As the Regional Forester summarized the situation:

The [Roadless Rule] remains the subject of nine lawsuits in six judicial districts and four judicial circuits. As these cases are resolved, direction for management of IRAs [Inventoried Roadless Areas] may change. The Payette NF will follow the most current direction for management of IRAs. The [Roadless Rule] if in effect would supercede this Revised Plan. In that case, those areas in the Revised Plan that are identified as available for treatment could not be treated unless they meet the exceptions in the [Roadless Rule] (ROD, p. 27).

Appellants maintain that the Roadless Rule was in effect at the time of the Regional Forester's decision (NOA #0018, p. 6; NOA #0020, pp. 4-5); however, as noted above, this was not the case. The Regional Forester also properly stated that if the Roadless Rule were eventually to go into effect, it would supercede the Payette LRMP.

Decision:

I find the Regional Forester's decision approving the Payette NF LRMP was consistent with the legal status of the Roadless Rule at the time the decision was made. The Regional Forester has provided for the possibility of the Roadless Rule being finally adopted, should that occur.